



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2005

Ms. YuShan Chang
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2005-02346

Dear Ms. Chang:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 220193.

The Houston Fire Department (the "fire department") received two requests from the same requestor for information relating to a list of 14 specified incidents, including call logs, dispatch records, and dispatch and arrival times. You inform us that the fire department has no responsive information relating to two of the listed incidents. We note that the Act does not require the fire department to release information that did not exist when it received these requests or to create responsive information.¹ You also state that the fire department will release some of the requested information. You claim that the rest of the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.²

¹See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²You inform us that some of the submitted information was provided for informational purposes only and is not responsive to these requests. This decision does not address the public availability of that information.

Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is made confidential by statute. You raise section 552.101 in conjunction with section 773.091 of the Health and Safety Code. Section 773.091 is applicable to information that relates to the provision of emergency medical services and provides in part:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

(c) Any person who receives information from confidential communications or records as described by this chapter, other than a person listed in Section 773.092 who is acting on the survivor’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was obtained.

Health & Safety Code § 773.091(a)-(c). Section 773.091 further provides, however, that

[t]he privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Id. § 773.091(g). You inform us that the information submitted as Exhibit 2 contains dispatch reports of the identity, evaluation, or treatment of patients that were created and are maintained by emergency medical services personnel of the fire department. Based on your representations and our review of the information in question, we agree that the information in Exhibit 2 is confidential under section 773.091 of the Health and Safety Code. We note that none of the exceptions to confidentiality under section 773.091 appears to be applicable in this instance. *See id.* §§ 773.092, .093. Therefore, except as specified by section 773.091(g), the fire department must withhold the information in Exhibit 2 under section 552.101 of the Government Code.

You claim that the rest of the responsive information is excepted from disclosure under section 552.108. This exception provides in part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2). Generally speaking, these provisions of section 552.108 are applicable to two mutually exclusive types of law enforcement information. Section 552.108(a)(1) applies if the release of the information at issue would interfere with a pending investigation or prosecution. Section 552.108(a)(2) is applicable only if the information at issue relates to a concluded case that did not result in a criminal conviction or a deferred adjudication. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

We note that section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is the investigation of crimes and enforcement of criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 is generally not applicable to records created by an agency whose chief function is essentially regulatory in nature. *See* Open Records Decision No. 199 (1978). However, an agency that does not qualify as a law enforcement agency may under certain limited circumstances claim that section 552.108 protects records in its possession. *See, e.g.*, Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 272 (1981). In this instance, the remaining information consists of records of the fire department, which is not a law enforcement agency for the purposes of section 552.108. You inform us, however, that the Houston Police Department (the "police department") asserts law enforcement interests in the remaining information. Therefore, we will consider whether the fire department may withhold the remaining information on behalf of the police department under section 552.108.

Under section 552.108(a)(1), you state that the information submitted as Exhibits 3, 6, 7, 9, and 11 relates to open and active criminal prosecutions. You also state that Exhibits 12 and 13 relate to an open and active criminal investigation. Based on your representations and our review of the information in question, we conclude that the fire department may withhold

Exhibits 3, 6, 7, 9, 11, 12, and 13 under section 552.108(a)(1). See Gov't Code § 552.108(a)(1); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Under section 552.108(a)(2), you inform us that Exhibits 4, 5, 8, and 10 relate to concluded criminal investigations that did not result in a conviction or deferred adjudication. Based on your representations and our review of those exhibits, we conclude that the fire department may withhold Exhibits 4, 5, 8, and 10 under section 552.108(a)(2). See Gov't Code § 552.108(a)(2).

In summary: (1) the fire department must withhold Exhibit 2 under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code, except as specified by section 773.091(g); (2) the fire department may withhold Exhibits 3, 6, 7, 9, 11, 12, and 13 under section 552.108(a)(1); and (3) the fire department may withhold Exhibits 4, 5, 8, and 10 under section 552.108(a)(2).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

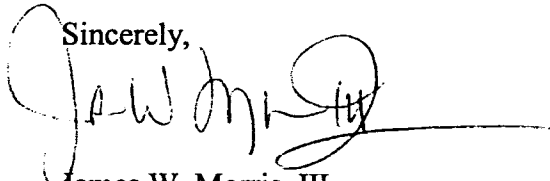
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read 'J.W. Morris, III', with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 220193

Enc: Submitted documents

c: Ms. Lise M. Olsen
The Houston Chronicle
801 Texas Avenue
Houston, Texas 77002
(w/o enclosures)